American Biomed Ambulette, Inc. and Electrical, Production & Industrial Workers Union, Local 118, AFL–CIO, Petitioner. Case 29–RC–8870

June 15, 1998

DECISION AND DIRECTION OF SECOND ELECTION

By Chairman Gould and Members Liebman and Brame

The National Labor Relations Board, by a threemember panel, has considered objections to an election held August 28, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 8 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings² and recommendations,³ and finds that the election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

CHAIRMAN GOULD, further concurring.

I agree with my colleagues' decision to adopt the hearing officer's recommendation to overrule the Petitioner's Objections 3(a) and (c), to sustain the Petitioner's Objections 1 and 2, and to set aside the August 28, 1997 election. I write separately with regard to Objection 1 which alleges that the *Excelsior* list was both incomplete and inaccurate. While I agree with my colleagues and the hearing officer that the Employer has not substantially complied with the Board's *Excelsior* requirements, I further find the hearing officer's conclusion that the Employer "acted with bad faith, or at a minimum, with gross negligence" is irrelevant to the resolution of an objection to an *Excelsior* list.

The Board adopted its *Excelsior* rule to achieve important statutory goals by ensuring that all employees are fully informed about the arguments for and against

representation and can freely and fully exercise their Section 7 rights. *Excelsior Underwear*, 156 NLRB 1236, 1240 (1966); *North Macon Health Care Facility*, 315 NLRB 359, 360–361 (1994); *Mod Interiors, Inc.*, 324 NLRB 164 (1997). Thus, it is important that the information in the *Excelsior* list be complete and accurate so that the union may have access to all eligible voters. As found by the hearing officer, 9 of the 26 addresses on the *Excelsior* list received by the Petitioner were incorrect. The Employer also failed to provide any zip codes. In this case, where 56 percent of the addresses were inaccurate, it is clear that the Employer has not substantially complied with the *Excelsior* requirements.

Unlike the hearing officer, however, I find it unnecessary to determine whether the Employer acted in good faith or with gross negligence in preparing the *Excelsior* list. As noted above, the Board adopted its *Excelsior* rule to achieve a fully informed electorate, not to test employer good faith. *North Macon*, 315 NLRB at 360. Since the Board has long recognized that the *Excelsior* rule is essentially prophylactic, the question of bad faith or inadvertence does not factor into the calculation of whether an employer has substantially complied with the rule.²

APPENDIX

OBJECTION NO. 1

In this objection, the Petitioner contends essentially that the Employer failed to provide a proper *Excelsior*³ voter eligibility list containing accurate and complete addresses of eligible voters.

In support of this objection, two witnesses, Randolph Lang and Raule Velasquez, testified on behalf of the Petitioner. The Employer presented its president, Carl Reade, as its witness

Certain facts, elicited through the testimony of Randolph Lang, the Petitioner's president, are not in dispute. The undisputed testimony is set forth in this paragraph. It is undisputed that the *Excelsior* list was received by the Petitioner on August 5, 1997, and this list did not contain the zip codes of the 16 employees named thereon. It is also undisputed that on August 5, the Petitioner reported the omission to the Board agent handling the case who agreed to call the Employer to request the missing zip codes. Further, it is undisputed that the Employer received a letter dated August 7, 1997, from the Board agent, confirming an August 6 conversation between the Board agent and the Employer's attor-

¹The pertinent portion of the hearing officer's report is attached as an appendix.

²The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

³ In adopting the hearing officer's recommendation to sustain Objection 1, we find it unnecessary to pass on the hearing officer's finding that the Employer acted with bad faith or gross negligence in failing to provide a complete and accurate list of eligible voters to the Petitioner.

Unlike his colleagues, Member Brame adopts the hearing officer's recommendation sustaining Objection 2, thus finding it unnecessary to pass upon Objection 1.

¹The hearing officer stated that the Employer offered no credible evidence to establish that it had provided the best evidence in its records. I find that such evidence, if offered, is irrelevant to the resolution of an *Excelsior* objection.

² Thrifty Auto Parts, Inc., 295 NLRB 1118 (1989). See also Gamble Robinson Co., 180 NLRB 532 (1970) (employer's claim of inadvertence cannot excuse its failure to afford the union an opportunity prior to the election of informing a substantial percentage of the electorate of the union's position and the issues raised by it).

³ Excelsior Underwear, 156 NLRB 1236 (1966).

ney, regarding the Employer's failure to include zip codes on the Excelsior list. (Tr. 22.)4 The letter (Board Exh. 2) essentially states that on August 6, the Board agent requested the Employer's attorney to provide the zip codes; that the Employer agreed; but that the zip code information had not been received. The letter again requested the Employer to provide the missing zip codes to cure any possible objections by the Petitioner. Finally, it is undisputed that the Excelsior list contained inaccurate addresses for nine employees, the majority of the bargaining unit employees, which resulted in 32 letters from six mailings being returned to the Petitioner. See Petitioner's Exhibit 2(a)- 2(ff). The 32 letters were returned to the Petitioner by the United States Postal Service, despite that Petitioner addressed the envelopes according to the information provided by the Employer on the Excelsior list and zip codes that the Petitioner added as a result of its own investigation.5 These envelopes, addressed to nine different employees, were returned for reasons including: "attemptednot known''; "insufficient address," "moved- not forwardable"; "no apartment number, insufficient address"; and "moved-left no address." Upon examination of Petitioner's Exhibit 2(a)-2(ff), none of the envelopes were returned for the specific reason of an incorrect zip code.

Lang testified that the Petitioner never received a voter eligibility list containing the employees' zip codes. Lang testified that he met with about half of the employees and he did not ask them for their addresses or zip codes. Additionally, Lang claims that when he became aware of the undeliverable letters/inaccurate addresses, he complained to the Board agent handling the case.

Turning to credibility, after observing the demeanor and listening carefully to the testimony of Lang, I generally credit Lang's version of events, and his testimony that he did not receive the zip code information from either the Board or the Employer.⁶ Lang's direct testimony, in the form of a narrative, was logical and trustworthy. He consistently answered questions asked of him in a straightforward and honest manner.⁷

Raule Velasquez

The facts set forth in this paragraph, elicited through the testimony of Raule Velasquez, are undisputed. The address provided on the Excelsior list for Raule Velasquez was 1482 Herkimer Street; this address was not Velasquez' address at the time the Excelsior list was provided by the Employer. The 1482 Herkimer Street address, was the address that Velasquez provided to the Employer when he first started working for the Employer, about 6 years ago. Velasquez lived at several addresses since the Herkimer Street address. Velasquez' current address is 205 Jamaica Avenue.⁸ (Tr. 90.) Additionally, Velasquez provided a copy of his renewed driver's license to the Employer, which contained his current address, when it was issued, in 1995. Finally, the Employer does not dispute that in August, about 2 or 3 weeks before the election, dispatcher, Benjamin Irizarry, asked employees to sign a yellow legal pad with their new addresses.9 (Tr. 94, 96.) Irizarry told Velasquez that this new list was intended to be an updated list to the Excelsior list. 10 When Velasquez saw the list, there were already about five names with addresses on the list.11

Velasquez' initial testimony regarding whether he notified his Employer about his change of address was confused and uncertain. First Velasquez testified that most likely he did not notify the Employer that he moved from 1482 Herkimer Street (Tr. 81); then he stated that he probably notified the Employer that he moved from 1482 Herkimer Street (Tr. 88); then Velasquez stated that he did not recall whether he notified the Employer about his new addresses (Tr. 90); then Velasquez stated that most likely he did notify the Employer of a change of address (Tr. 92). Afler extensive questioning, on cross-examination, Velasquez testified that he did not know or did not recall whether he advised his Employer of any change of address in the past 5 years; maybe he did and maybe he did not. (Tr. 93.) As noted above, after a further question, about whether he had notified the Employer within the last 12 months of his address, Velasquez recalled with detail that in August, about 2 or 3 weeks before the election, he provided his current address to the Employer.

Velasquez contended that the Employer should have his current address in its records because he filled out forms containing that information for the Taxi and Limousine Commission and had physical exams annually.¹² Velasquez also

⁴References to the Board's and Petitioner's exhibits will be cited as Board Exh. and Petitioner Exh. , respectively. References to the transcript will be cited as Tr.

⁵The Petitioner looked in a zip code book for this information. (Tr. 26.)

⁶Accordingly, I credit the undisputed testimony elicited through Lang.

⁷There are two topics in Lang's testimony that I specifically do not rely on. I do not rely on Lang's testimony, elicited during crossexamination, that he called the Board agent handling the case and advised her regarding the inaccurate addresses on the Excelsior list for the following reasons. First, Lang states that this conversation with the Board agent was on August 5, which was the day that he received the Excelsior list. Taking into consideration that the mail was addressed in accordance with the information on the list, which the Union received on August 5, logically, the Union could not have received the undeliverable mail back from the United States Postal Service yet. Additionally, when Lang presented his narrative, he mentioned only that he advised the Board agent of the missing zip code information, not inaccurate addresses on August 5. Finally, Lang also testified that he did not find out about the returned envelopes right away. (Tr. 28-29.) Nor do I rely on the testimony concerning Lang meeting with employees before the election and the number of employees that Lang met with, as it is irrelevant. See Thrity Auto Parts, Inc., 295 NLRB 1118 (1989) (where the Board held that a union's ability to communicate with employees by means

other than the eligibility list does not influence the determination of whether the Employer has substantially complied with its *Excelsior* duty.) Notwithstanding this, I generally believe Lang's testimony and find that any discrepancies with regard to advising the Board of address inaccuracies on the list or the number of employees that he met with to be immaterial facts before me.

⁸This has been Velasquez' address for about the last 3 years.

⁹The Employer admits that it directed Irizarry to compile this information.

¹⁰ I note that Velasquez testified that Irizarry is his manager and supervisor (which is in dispute) as well as a dispatcher. I find it is unnecessary to determine whether Irizarry is a supervisor within the meaning of the Act, as these facts concerning the compilation of the updated information and the reason therefor are not in dispute.

¹¹ Velasquez could not recall whether there were zip codes on the list, other than his own.

¹² Velasquez admits that he does not know whether the Employer maintains these records.

testified that everyone at the office knew that he lived diagonally across the street from the Employer's facility.

Turning to credibility, after observing the demeanor and listening carefully to the testimony of Velasquez, I generally credit his version of events related above. Velasquez generally answered questions in a straightforward and honest manner. Much of Velasquez' testimony is not disputed by the Employer's sole witness. Velasquez' testimony regarding the list on which Irizarry asked employees to place their new addresses on was clear and detailed. Accordingly, although Velasquez' testimony regarding whether he notified the Employer of any of his address changes before August 1997, is uncertain and cannot be relied upon, I credit his testimony regarding Irizarry's solicitation of the employees' new addresses in August, which coincides with the testimony of the Employer's witness.¹³ Further, the testimony of the Employer's witness is somewhat consistent with Velasquez' testimony on providing the Employer with a copy of his renewed driver's license in 1995, (this license contained his present address), as the Employer's witness states that it is possible that Velasquez gave the Employer a copy of it.14

Carl Reade¹⁵

It is undisputed that Carl Reade's secretary, Grace, and dispatcher, Benjamin Irizarry, prepared the Excelsior list by looking at the personnel files of the employees. Reade testified that this was the easiest way to compile the list. (Tr. 159.) Reade was uncertain as to whether he or his wife instructed the employees to prepare the Excelsior list. (Tr. 164, 198-199.) Essentially, the Employer's position appears to be that the personnel files contained the addresses that the employees gave at the time they started working for the Employer and that these were the best addresses that the Employer had on record. (Tr. 160, 164.) Reade appears to concede that the Excelsior list provided to the Board contained the addresses of employees when they first started working for the Employer. (Tr. 158.) Reade did not know if the Employer had the zip codes of all of its employees that worked for the Employer, but he testified that at some point the Employer tried to update the Excelsior list with the necessary information.¹⁶ Reade appeared to believe that his wife instructed Irizarry to make an updated list. (Tr. 182.) Reade testified that Irizarry did not give him the updated list, but Irizarry told Reade that he sent the updated list. Reade testified that he did not know where Irizarry sent the list or exactly when Irizarry sent the list, but it was in the summer before the election. (Tr. 161.)¹⁷ The foregoing testimony is

not disputed by the Petitioner, however, the Petitioner contends that it never received the updated list from the Board or the Employer.

With regard to the accuracy of the addresses provided on the Excelsior list, Reade testified inconsistently. Initially Reade did not recall any employee ever advising him of a new address. Reade also testified that employees did not always advise him when they moved or changed addresses. However, Reade also testified that infrequently employees advised him of their new address. Further, with regard to documentation containing address information in the Employer's files, Reade admits that it is possible that the Employer had Velasquez' current address in its records. (Tr. 182.) Reade concedes that he was aware that Velasquez moved from the address provided on the Excelsior list to an address on Easton Parkway. (Tr. 208.) Reade testified that employees did not come to him to update their W2 forms at the end of the year,18 Reade could not recall the address on Velasquez' most recent W2 form.¹⁹ Reade testified that employees did not routinely provide copies of their renewed driver's license to the Employer; however he also testified that on occasion, employees have provided to the Employer a copy of their driver's license when it is renewed; and that it is possible that employee Velasquez provided the Employer a copy of his renewed driver's license (which contained his new address). Reade states that Velasquez did not give the license to him directly; and if Velasquez provided a copy of his renewed driver's license, it would be in his file. Reade testified that he could not answer a question (asked by his attorney) on whether the Employer provided any addresses that he knew were inaccurate because he did not know. Thereafter, Reade testified that the Employer provided an accurate list according to its records; that the Employer made a good effort to provide everything that was available in the personnel files. (Tr. 163–164.)

After observing the demeanor and listening carefully to the testimony of Carl Reade, I find that I was unable to fully credit him. I credit Reade's testimony in areas not specifically mentioned in this paragraph only where it corroborates other witnesses or where his testimony is undisputed. Reade testified about many matters that he did not have direct knowledge of and the Employer failed to present the witnesses that would have direct knowledge in order to corroborate him or to fill in the gaps. Generally, throughout his testimony, Reade was evasive, he did not respond directly to the questions asked of him even by his own attorney,20 and his testimony lacked detail, which may be in part due to his lack of knowledge. I note that Reade admitted that he was angry during the hearing. (Tr. 163.) Further, I find that Reade, an interested party in these proceedings, is at times inconsistent. For example, first Reade testified that Irizarry told him that he sent the updated list of address information and that he

¹³ The Employer's witness, Carl Reade, refers to Velasquez' testmony on this matter and does not dispute it.

¹⁴I also credit any other undisputed testimony elicited through Velasquez which is not noted specifically herein.

¹⁵ Reade is the Employer's president.

¹⁶Reade asserts that this action was prompted by a request from an unknown party. Reade alludes to Velasquez' testimony about Irizarry's compilation of the updated information without denying it. (Tr. 187.)

¹⁷I note here that later in his testimony Reade inconsistently testifies in a confused manner concerning whether updated information was provided to the Board. Reade testified that Irizarry told him that the zip code information was provided to the Board. (Tr. 183–184.) This is hearsay evidence and I do not rely on it. Inzarry was not presented as a witness. Nor was any such documentary evidence produced as an exhibit to this proceeding. When asked by the hearing

officer for a copy of this updated list, the Employer's attorney stated that he did not know if the Employer still had "such a list" and did not know if the list still existed. During a recess, the Employer was unsuccessful in having the list faxed to the hearing. Reade did not claim that he saw the updated list.

¹⁸ Reade contends that employees picked up their paychecks and W2 forms; the Employer did not mail these items to employees. (This testimony is undisputed.)

¹⁹ A copy of Velasquez' W2 was not offered into evidence.

²⁰ Tr. 163–164.

did not know where Irizarry sent the updated list of address information. Yet later, Reade hesitantly testified, allegedly based upon what an employee told him, that that Irizarry sent zip code information to the Board. I do not credit any of Reade's testimony on this matter since it is internally inconsistent and based upon hearsay evidence. Similarly, Reade's testimony about employees advising him of their new addresses is inconsistent, first he did not recall any employees ever advising him, then he testified that employees infrequently advised him, etc. (see above), and unreliable. I do credit the admissions made by Reade that it is possible that the Employer had Velasquez' current address in its records and that the Employer may have his current driver's license with his current address in its files. In sum, I find that much of Reade's testimony cannot be relied upon, including the Employer's assertion that it provided the best address information in its records in order to compile the Excelsior list. I note here again that the Employer did not present the employees that compiled the Excelsior list²¹ and it appears from Reade's testimony that the addresses were taken from the employees' personnel files which reflected the employees addresses when they applied for a job with the Employer, rather than more recent documentation maintained by the Employer.²² (Tr. 159-160, 181-182.) Further, I find that there is insufficient evidence to establish that the Employer sent an updated list with address and/or zip code information to the Petitioner or the Board.

DISCUSSION

The evidence shows that the Union did six mailings to employees; and 32 envelopes sent to 9 different employees were returned by the United States Postal Service for the following reasons: "attempted-not known"; "insufficient address"; "moved-not forwardable"; "no apartment number, insufficient address"; and "moved-left no address." Since these envelopes were undeliverable, the evidence tends to show that the addresses provided for these nine employees were inaccurate. One of these nine employees, Raule Velasquez, credibly testified that the address provided by the Employer was not his current address. Although the Employer asserts that the best known addresses were provided on the *Excelsior* list, the inaccurate addresses were not compared against any of the Employer's records that contain employee addresses. Further, there is no credible testimony to

establish that the Employer provided the best addresses in its records. In these circumstances, I find that 9 out of 16 inaccurate addresses, which is about a 56 percent inaccuracy rate, standing alone, is sufficient to require setting aside an election, as the Employer has not substantially complied with the Excelsior rule. See Women in Crisis Counseling & Assistance, 312 NLRB 589 (1993)²³ Mod Interiors, Inc., 324 NLRB No. 33 (Aug. 7, 1997).²⁴ Moreover, the Petitioner contends that the Employer acted in bad faith by providing inaccurate addresses and failing to provide the zip codes. In considering whether the Employer acted with bad faith or gross negligence, I note again the substantial inaccuracy rate, a majority of the addresses provided by the Employer on the Excelsior list were inaccurate, and the failure to provide zip codes for all of the employees on the list. Additionally, there is undisputed testimony that in early August, weeks before the election, the Board requested that the Employer provide the zip code information. Further, there is credited testimony that in about early August, at the direction of Manager/Dispatcher Irizarry,25 employees provided their address information on a yellow legal pad so that the Employer could update the Excelsior list.26 However, the evidence does not establish that the Employer provided this information to the Board or the Union. Based on the foregoing, I find that the Employer acted with bad faith, or at a minimum, with gross negligence. Accordingly, I recommend that Petitioner's Objection No. 1 be sustained and the election be set aside.²⁷

²¹ Reade admits that he was not directly involved in the creation of the *Excelsior* list (Tr. 197); that employees Irizarry and Grace compiled the list; and he was not even sure if he personally made the direction to compile the list. (Tr. 164.)

²²Here, the Employer apparently took exception when providing the address of Julio Galleano, who, according to the Employer, requested that his mail be sent to the Employer's 2 Arlington Avenue address about 1 year ago.

²³ Where a list of 20 eligible employees prepared by an employer contained six inaccuracies, and there was no evidence that the inaccuracies were a result of gross negligence or bad faith, the Board found that the number of inaccuracies was not substantial enough to require setting aside the election.

²⁴ In *Mod Interiors*, supra., an election was set aside where 40 percent of the addresses on the original list were inaccurate, a corrected list was received by the union only 8 days before the election, and the election results were close.

²⁵ Reade testified that Irizarry was one of the employees that the Employer had designated to compile the *Excelsior* list and the necessary information to update the list.

²⁶ Although the updated list is not in evidence, there is credible testimony that it contained the current address of employee Velasquez. Further, the evidence shows that as employees entered work, Irizarry told employees to provide their name and address to update the *Excelsior* list. (Tr. 94, 96.) It is logical to assume that the other employees when asked to provide their current address information on a list would do so.

²⁷ See *Center Engineering, Inc.*, 253 NLRB 419 1980) (The Board found substantial noncompliance where the list, which was not alphabetized by surname and only 25 out of 424 addresses included zip codes, was constructed with bad faith or at least willful and gross negligence.) See also *Women in Crisis Counseling & Assistance*, 312 NLRB 589 (1993); *Wasatch Medical Management Services*, 272 NLRB 1180 (1984).